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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSE MARIO ARMENDARIZ, Defendant and Appellant.	B172781 (Los Angeles County Super. Ct. No. KA 053133)

APPEAL from the judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez, Chung L. Mar and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Mario Armendariz was convicted of the first degree murder of his girlfriend, Teresa Gaspar (Teresa), and the attempted murder of Jose Mauricio Guevara (Jose), a neighbor who tried to intervene during the attack on Teresa. He contends on appeal that the trial court gave incomplete instructions regarding other crimes of domestic violence or, alternatively, that the failure to request such instructions constituted ineffective assistance by his trial counsel. He also argues that imposition of consecutive sentences on the counts of murder and attempted murder violated his Sixth Amendment right to trial by jury, under *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*).

We find no prejudicial error, and affirm.

FACTS

On July 3, 2001, Teresa lived with appellant and their child in an apartment. Teresa came into Jose's apartment at approximately 1 p.m. She asked him to call the police, as appellant was hitting her. Appellant climbed in through the window. He told Jose that he was going to kill Teresa because he had found her with another man. After a struggle, appellant took a knife from the kitchen and stabbed Teresa seven times, inflicting a lethal wound to her heart. When Jose tried to intervene, appellant stabbed him in the shoulder, hands, back, neck and head. Appellant followed Jose out of the apartment. Appellant then retrieved his child from his own apartment and drove away.

A neighbor saw Teresa outside the apartment, holding her bleeding chest. Teresa asked the neighbor to call the police and said that her husband wanted to kill her. She fell to the ground and did not move again.

Two years later, appellant was arrested by Border Patrol when he tried to cross from Mexico into New Mexico.

At the trial, three women who had worked at a hotel with Teresa testified that they had often seen injuries on her, such as bruises, scratches and a black eye. One of the women had seen appellant push and yell at Teresa in the parking lot. Teresa told the women that appellant had threatened to kill her, and she was afraid of him. Two weeks before she died, she had a red mark on her neck. She said the mark resulted from appellant's attempt to stab her with a screwdriver.

A woman named Dorina Pedroza (Dorina) testified that she had dated appellant for a few months in 1993. When she told him that she did not want to see him anymore, he pointed a gun at her waist and told her that he was going to kill her. The incident ended when appellant's brother arrived.

DISCUSSION

1. Instructional Issue

The evidence that appellant had previously injured Teresa and had threatened Dorina with a gun was admitted under Evidence Code section 1109. That statute permits evidence of a criminal defendant's prior acts of domestic violence to be used to show a disposition to commit such crimes, where the defendant is currently charged with an offense involving domestic violence.

The trial court instructed the jury on how to use the other crimes evidence by giving CALJIC No. 2.50.02, "Evidence of Other Domestic Violence." Appellant complains that, because the jury was not also given CALJIC Nos. 2.50.1 and 2.50.2, it was not told that the prosecution had the burden to prove that he committed the other crimes. He relies on the rule that a trial court must instruct sua sponte on the general principles of law which are closely and openly connected with the evidence and are necessary for the jury's understanding of the case. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

The record shows that the prosecutor requested CALJIC No. 2.50.1 as well as CALJIC No. 2.50.02. The trial court gave CALJIC No. 2.50.02 and not CALJIC No. 2.50.1 because it believed that the former instruction related more directly to the facts of the case. Defense counsel submitted the issue. CALJIC No. 2.50.2, the other instruction raised by appellant on appeal, was not mentioned by either side below.

The instruction the jury received, CALJIC No. 2.50.02, explains that (1) if proven by a preponderance of the evidence, other acts of domestic violence can be used to infer that a defendant had a disposition to commit that type of offense; and (2) such a

disposition can be used to decide if a defendant is guilty beyond a reasonable doubt of the charged crime.[1]

Close inspection shows that CALJIC No. 2.50.1, which was not given, contains some of the same information as CALJIC No. 2.50.02, but also states that it is the prosecution's burden to prove that the defendant committed the other crime.[2]

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[1] The version of CALJIC No. 2.50.02 which the jury received stated:

"Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence [on one or more occasions] other than that charged in the case.

"'Domestic violence' means abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the defendant has had a child or is having or has had a dating or engagement relationship. ['Cohabitant' means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.] 'Abuse' means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another. If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit [another] [other] offense[s] involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that [he] [she] was likely to commit and did commit the crime [or crimes] of which [he] [she] is accused. However, *if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence*, that is not sufficient by itself to prove beyond a reasonable doubt that [he] [she] committed the charged offense[s]. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime.

"[[Unless you are otherwise instructed, y][Y]ou must not consider this evidence for any other purpose.]" (Italics added.)

[2] CALJIC No. 2.50.1 states:

CALJIC No. 2.50.2 defines the term "preponderance of the evidence." It also tells the jurors to find against an issue which is not proven by that standard, if it was not proven by the party bearing the burden of proof.[3]

We need not decide whether the trial court erred in failing to give CALJIC Nos. 2.50.1 and 2.50.2. Assuming arguendo that any error occurred, there was no possible prejudice. Appellant killed Teresa in front of Jose, who survived to describe the stabbings. Three of Teresa's coworkers testified about Teresa's previous injuries. Dorina told the jury about the gun incident in 1993. There was no defense, and no issue regarding whether appellant committed the uncharged offenses. Moreover, the jury was told by CALJIC No. 2.50.02 that it had to "find by a preponderance of the evidence that

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"Within the meaning of the preceding instruction[s], the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed [a] [crime[s]] [or] [sexual offense[s]] other than [that] [those] for which [he] [she] is on trial.

"You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that [a] [the] defendant committed the other [crime[s]] [or] [sexual offense[s]].

"[If you find other crime[s] were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged [or any included crime] in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.]"

[3] CALJIC No. 2.50.2 states:

"'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

"You should consider all of the evidence bearing upon every issue regardless of who produced it."

the defendant committed a prior crime or crimes involving domestic violence . . . ." It was also instructed that the People had the burden of proving guilt beyond a reasonable doubt (CALJIC No. 2.90). The absence of CALJIC Nos. 2.50.1 and 2.50.2 was therefore harmless, whether we apply the standard of *Chapman v. California* (1967) 386 U.S. 18, 23-24, or *People v. Watson* (1956) 46 Cal.2d 818, 836.

For similar reasons, appellant has not proven that his trial counsel was ineffective in failing to request CALJIC Nos. 2.50.1 and 2.50.2. To prevail on such a claim, appellant "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice." (*People v. Bolin* (1998) 18 Cal.4th 297, 333, citing *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 217.) Since the jury received CALJIC No. 2.50.02 and the evidence was overwhelming, appellant has not made the requisite showing.

2. Sentencing Issue

For the murder of Teresa, appellant was sentenced to 25 years to life in prison, plus one year for use of the knife. For the attempted murder of Jose, he received a consecutive sentence of life imprisonment, plus one year for knife use and three years for infliction of great bodily injury.

Appellant contends that imposition of consecutive sentences for the two crimes was contrary to *Blakely*, *supra*, __ U.S. __ [124 S.Ct. 2531].

As a preliminary matter, we reject respondent's claim that appellant waived this issue by not raising it below. Application of the waiver doctrine of *People v. Scott* (1994) 9 Cal.4th 331 would be inappropriate. *Scott* held that, to facilitate prompt correction of error, a defendant must make a challenge at the trial court level in order to pursue a claim that an aggravated sentence was imposed based on erroneous or flawed information. That rationale cannot apply to lack of an objection on *Blakely* grounds. Before *Blakely*, there was no right to a jury trial on aggravating factors, so assertion of a challenge to the sentence on that basis would have been futile. Also, since *Blakely* was decided after appellant was sentenced, the lack of an objection cannot be construed as a knowing and intelligent waiver of a right to jury trial which did not then exist.

Even so, there was no *Blakely* error in this case. *Blakely* may be implicated where the court departs from the standard sentencing range for a crime based on an aggravating factor which was not reflected in the jury's verdict or admitted by the defendant. (*Blakely*, *supra*, __ U.S. at p. __ [124 S.Ct. at p. 2537].) The jury's verdict here reflects separate crimes against Teresa and Jose. Moreover, there is a statutory presumption in favor of the middle term, but no comparable presumption in favor of concurrent rather than consecutive sentences. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) *Blakely* therefore has no impact on consecutive sentencing.

DISPOSITION

The judgment is affirmed.

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FLIER, J.

We concur:

COOPER, P.J.

BOLAND, J.